

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Ken Martin,
Complainant,
vs.
Representative Greg Davids
Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING**

TO: Ken Martin 255 East Plato Boulevard, St. Paul, MN 55107; and Representative Greg Davids, 283 State Office Building, 101 Rev. Martin Luther King Blvd., St. Paul, MN 55155

On March 21, 2013, Ken Martin filed a Campaign Complaint with the Office of Administrative Hearings alleging that Representative Greg Davids violated Minnesota Statutes § 211B.06 in connection with letters published in the *Brainerd Dispatch*, *Albert Lea Tribune*, the *Grant County Herald* and the *Hinckley News*. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of Minnesota Statutes § 211B.06.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter is scheduled for a prehearing scheduling conference to be held by telephone before the undersigned Administrative Law Judge at **11:00 a.m. on Wednesday, April 17, 2013**. The scheduling conference will be conducted by telephone conference call. At the appointed time, you must call: **1-888-742-5095**. When the system asks for your numeric pass code, enter **249 440 7275#** on your telephone and you will be connected to the conference.

At the prehearing conference, preliminary matters will be addressed such as identifying the issues to be resolved, the number of potential witnesses and exhibits should the matter proceed to hearing, possible dates for the hearing, the filing of any dispositive motions, and determining whether the matter may be disposed of without an evidentiary hearing.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O.

Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: March 26, 2013

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

Complainant, Ken Martin is the Chair of the Democratic-Farmer-Labor Party. Respondent, Representative Greg Davids, is a Republican who represents District 28B in the Minnesota House of Representatives.¹

The Complaint alleges that on February 20, 2013, under the order of business "Reports of standing committees and divisions," the Republican minority in the Minnesota House of Representatives requested a roll call vote on the adoption of the Committee on Rules report on HF677, Governor Dayton's tax proposal. It was a procedural vote to accept the Rules Committee report and move the bill to the Committee on Taxes where it could be heard and debated. The vote did not address the substance of the Governor's tax plan. It only determined whether the bill would move from one committee to the next on this particular day.

The Complaint alleges that following the procedural vote on February 20, 2013, Representative Davids authored letters to the editor that were published in the *Brainerd Dispatch*, *Albert Lea Tribune*, the *Grant County Herald* and the *Hinckley News* accusing DFL members of the House of Representatives of "voting in favor of" Governor Dayton's tax proposal. The letter published in the *Brainerd Dispatch* stated in pertinent part "On Feb 20, Rep. Radinovich voted in favor of raising taxes by 3.7 billion, a move that will impact EVERY taxpaying Minnesotan, from the richest to the poorest of the poor." Identical language was used in each of the other letters. The Complainant argues that since the vote on February 20th was procedural, it was not a vote "in favor of raising taxes by 3.7 billion." The Complainant asserts that the claims by Representative Davids in his letters to the newspaper editors are factually false and that Representative Davids communicated the claims knowing they were false in violation of Minn. Stat. § 211B.06.

¹ House District 28B includes all of Fillmore and Houston Counties.

Legal Standard

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.² For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.³ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁴

Minnesota Statutes § 211B.06

Minn. Stat. § 211B.06 provides in relevant part, that:

A person is guilty of a misdemeanor who intentionally participates in the drafting of a letter to the editor with respect to the personal or political character or acts of a candidate . . . that is designed or tends to elect, injure, promote, or defeat any candidate for nomination or election to a public office . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.⁵

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of campaign material or advertising that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.⁶ The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.⁷ Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondent prepared or disseminated the campaign material knowing that it was false or did so with reckless disregard for its truth or falsity.⁸

The allegations in the Complaint concern political acts of certain members of the Minnesota House of Representatives. In a written submission filed on March 26, 2013, counsel for the Respondent argues that the Complaint should be dismissed because

² *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

³ *Id.*

⁴ *Id.*

⁵ Minn. Stat. § 211B.06, subd. 1 (emphasis added).

⁶ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); *See, Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

⁷ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁸ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

the targeted members of the House are not “candidates.” The word “candidate” is defined to mean an individual who “seeks nomination or election” to federal, statewide, legislative, judicial or local office.⁹ The Respondent asserts that since the four members of the House are not *currently* seeking election to office, the alleged false statement in the letters to the editors do not relate to a candidate’s acts and, therefore, are not actionable under § 211B.06.

The Administrative Law Judge cannot make a determination on this record as to whether the four members of the House targeted in the Respondents’ letters to the editor intend on seeking re-election in 2014 and, therefore, meet the definition of “candidate” under § 211B.01. At the prehearing conference, the ALJ will hear the Respondent’s argument that definition of “candidate” should be limited to only those “currently seeking” election and will permit the Complainant the opportunity to respond in order to develop the record more fully before rendering a decision. The Administrative Law Judge finds, however, that the statements at issue are otherwise capable of being proven true or false and are not, as Respondent claims, within the exclusive authority of the Legislative Branch and outside of the reach of the Fair Campaign Practices Act.

The Administrative Law Judge concludes that the Complaint has alleged sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.06. This matter will proceed to a prehearing conference on the alleged violations of Minn. Stat. § 211B.06 as indicated in this Order.

J. E. L.

⁹ Minn. Stat. 211B.01, subd. 3.